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# TAX LAW—THE 1984 AMENDMENT TO I.R.C. section 152(e): DID CONGRESS INTEND TO PREEMPT A STATE COURT'S AUTHORITY TO ALLOCATE THE DEPENDENT CHILD EXEMPTION?

Rodney V. Nutt

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# NOTES

## TAX LAW—THE 1984 AMENDMENT TO I.R.C. § 152(e): DID CONGRESS INTEND TO PREEMPT A STATE COURT'S AUTHORITY TO ALLOCATE THE DEPENDENT CHILD EXEMPTION?

### INTRODUCTION

Internal Revenue Code ("I.R.C.") § 151(c)(1)(B)<sup>1</sup> grants an individual taxpayer a tax deductible, personal exemption<sup>2</sup> for each dependent child. In the case of divorced or legally separated parents, I.R.C. § 152(e)<sup>3</sup> provides a "support test" to determine which parent is entitled to the dependent child exemption.<sup>4</sup> Prior to its amendment in 1984,<sup>5</sup> state courts generally interpreted section 152(e)<sup>6</sup> as providing a state court with the authority to allocate the dependency exemption to either the custodial parent or the noncustodial parent when deciding family support and child custody matters.<sup>7</sup> Indeed, in its prior form section 152(e) expressly permitted state courts, through a decree of divorce or separate maintenance, to allocate the exemption to either the custodial or the noncustodial parent.<sup>8</sup> However, section 152(e),<sup>9</sup> in its amended form, contains no specific language that would permit a

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1. I.R.C. § 151(c)(1)(B) (1988).

2. An "exemption" is defined as "an amount allowed as a deduction from adjusted gross income in arriving at taxable income." BLACK'S LAW DICTIONARY 571-72 (6th ed. 1990).

3. See I.R.C. § 152(e) (1988).

4. *Id.*

5. Tax Reform Act of 1984, Pub. L. No. 98-369, § 423(a), 98 Stat. 494, 799-800 (codified as amended at 26 U.S.C. § 152(e) (1988)).

6. See Act of Aug. 31, 1967, Pub. L. No. 90-78, 81 Stat. 191, *amended by* Tax Reform Act of 1976, Pub. L. No. 94-455, sec. 2139, § 152(e)(2)(B)(i), 90 Stat. 1520, 1932 (current version at I.R.C. § 152(e) (1988)).

7. *In re Marriage of Einhorn*, 533 N.E.2d 29, 36 (Ill. App. Ct. 1988).

8. See Act of Aug. 31, 1967, Pub. L. No. 90-78, § 152(e)(2)(A)(i), 81 Stat. 191, 191-92 (current version at I.R.C. § 152(e) (1988)); see also Amanda S. Bornhorst, Note, *Custodial Parent Dependency Exemptions: Hughes v. Hughes*, 5 AKRON TAX J. 233, 233 (1988) (stating that the pre-1984 amendment version of § 152(e) "clearly acknowledged the jurisdiction of state courts to award the [dependency exemption] to the noncustodial parent").

9. I.R.C. § 152(e) (1988).

state court to allocate the dependent child exemption. As a result, some state courts have held that they no longer possess the authority to allocate the exemption.<sup>10</sup> Moreover, because section 152(e) specifically allocates the exemption to the custodial parent,<sup>11</sup> some courts have asserted that a state court is now preempted<sup>12</sup> from allocating the exemption to noncustodial parents.<sup>13</sup>

Conversely, other state courts have maintained that the changes to section 152(e) have not preempted their authority to allocate the dependent child exemption.<sup>14</sup> Despite the automatic allocation of the exemption to the custodial parent, these courts have asserted that they may allocate the exemption to the noncustodial parent by ordering the custodial parent to release his or her claim to the exemption. Section 152(e) provides that a noncustodial parent may claim the dependency exemption if the custodial parent releases his or her claim to the exemption.<sup>15</sup> However, the statute is silent as to whether a state court may order such a release. Consequently, state courts disagree as to

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10. See *Holley v. Holley*, 547 So. 2d 192 (Fla. Dist. Ct. App. 1989); *Blanchard v. Blanchard*, 401 S.E.2d 714 (Ga. 1991); *Varga v. Varga*, 434 N.W.2d 152 (Mich. Ct. App. 1988); *Bennett v. Bennett*, 528 N.Y.S.2d 103 (N.Y. App. Div. 1988); *Gleason v. Michlitsch*, 728 P.2d 965 (Or. Ct. App. 1986); *Josey v. Josey*, 351 S.E.2d 891 (S.C. Ct. App. 1986); *Brandriet v. Larsen*, 442 N.W.2d 455 (S.D. 1989); *Sarver v. Dathe*, 439 N.W.2d 548 (S.D. 1989).

11. See I.R.C. § 152(e)(1) (1988).

12. In this context, preemption means that federal law will override state law. See JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 9.1 (3d ed. 1986).

13. See *Blanchard v. Blanchard*, 401 S.E.2d 714 (Ga. 1991); *Varga v. Varga*, 434 N.W.2d 152 (Mich. Ct. App. 1988); *Gleason v. Michlitsch*, 728 P.2d 965 (Or. Ct. App. 1986); *Brandriet v. Larsen*, 442 N.W.2d 455 (S.D. 1989); *Sarver v. Dathe*, 439 N.W.2d 548 (S.D. 1989).

14. See *Gamble v. Gamble*, 562 So. 2d 1343 (Ala. Ct. App. 1990); *Lincoln v. Lincoln*, 746 P.2d 13 (Ariz. Ct. App. 1987); *In re Marriage of Beyer*, 789 P.2d 468 (Colo. Ct. App. 1989); *Serrano v. Serrano*, 566 A.2d 413 (Conn. 1989); *Rohr v. Rohr*, 800 P.2d 85 (Idaho 1990); *In re Marriage of Rogliano*, 555 N.E.2d 1114 (Ill. App. Ct. 1990); *In re Marriage of Baker*, 550 N.E.2d 82 (Ind. Ct. App. 1990); *In re Marriage of Dawson*, 467 N.W.2d 271 (Iowa 1991); *In re Marriage of Clingan*, No. 62,431, 1989 Kan. App. LEXIS 206 (Mar. 24, 1989); *Hart v. Hart*, 774 S.W.2d 455 (Ky. Ct. App. 1989); *Boudreau v. Boudreau*, 563 So. 2d 1244 (La. Ct. App. 1990); *Wassif v. Wassif*, 551 A.2d 935 (Md. Ct. Spec. App.), *cert. denied*, 556 A.2d 674 (Md. 1989); *Bailey v. Bailey*, 540 N.E.2d 187 (Mass. App. Ct. 1989); *In re Marriage of Ley*, No. C2-90-1121, 1990 Minn. App. LEXIS 906 (Sept. 12, 1990); *Nichols v. Tedder*, 547 So. 2d 766 (Miss. 1989); *Vohsen v. Vohsen*, 801 S.W.2d 789 (Mo. Ct. App. 1991); *In re Marriage of Milesnick*, 765 P.2d 751 (Mont. 1988); *Babka v. Babka*, 452 N.W.2d 286 (Neb. 1990); *Gwodz v. Gwodz*, 560 A.2d 85 (N.J. Super. Ct. App. Div. 1989); *Fleck v. Fleck*, 427 N.W.2d 355 (N.D. 1988); *Bobo v. Jewell*, 528 N.E.2d 180 (Ohio 1988); *Motes v. Motes*, 786 P.2d 232 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990); *In re Marriage of Peacock*, 771 P.2d 767 (Wash. Ct. App. 1989); *Cross v. Cross*, 363 S.E.2d 449 (W. Va. 1987); *Pergolski v. Pergolski*, 420 N.W.2d 414 (Wis. Ct. App. 1988).

15. I.R.C. § 152(e)(2) (1988).

whether section 152(e) now preempts a state court from allocating the exemption to the noncustodial parent by ordering the custodial parent to execute a release of the exemption.

This Note contrasts two recent cases, *Sarver v. Dathe*<sup>16</sup> and *Serrano v. Serrano*,<sup>17</sup> in an attempt to determine whether section 152(e) now preempts a state court from allocating the dependent child exemption. Section I sets forth the pre-1984 and post-1984 amendment provisions of section 152(e). Section II examines *Sarver v. Dathe*, which held that section 152(e) now preempts a state court's authority to allocate the dependent child exemption. Section III examines *Serrano v. Serrano*, which held that section 152(e), in its amended form, does not preempt a state court's authority to allocate the exemption. Lastly, Section IV analyzes and contrasts *Sarver* and *Serrano*. Section IV concludes that *Sarver* correctly suggests that a state court's allocation of the dependency exemption does major damage to Congress' intention of conferring a tax benefit upon custodial parents. Consequently, section 152(e), as amended, preempts a state court from allocating the dependent child exemption.

### I. I.R.C. § 152(e)

I.R.C. § 151(c)(1)(B)<sup>18</sup> establishes that a taxpayer may claim as a deduction an exemption amount<sup>19</sup> for each dependent child.<sup>20</sup> In the case of divorced or legally separated parents, I.R.C. § 152(e) provides a "support test" to determine which parent is entitled to the dependent child exemption.<sup>21</sup> The support test seeks to resolve whether the custodial or the noncustodial parent has contributed more than half of the support received by the child during the taxable year.<sup>22</sup> The parent deemed to have contributed that amount is permitted, under I.R.C. § 152(a), to treat the child as his or her dependent.<sup>23</sup> Section 151(c)(1)(B) allows this parent to claim an exemption for the dependent.<sup>24</sup>

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16. 439 N.W.2d 548 (S.D. 1989).

17. 566 A.2d 413 (Conn. 1989).

18. I.R.C. § 151(c)(1)(B) (1988).

19. *See id.* § 151(d).

20. For purposes of § 152(e), a "child" is defined as "an individual who . . . is a son, stepson, daughter, or stepdaughter of the taxpayer." *See id.* § 151(c)(3).

21. *Id.* § 152(e).

22. *Id.*

23. Section 152(a) defines "dependent" as "[an] individual[ ] over half of whose support, for . . . the taxable year of the taxpayer . . . , [is] received from the taxpayer." *Id.* § 152(a).

24. I.R.C. § 151 (1988) provides in pertinent part:

A. *Dependent Child Exemption Requirements Prior to the 1984 Amendment to I.R.C. § 152(e)*

Prior to its amendment in 1984, section 152(e) permitted the parent who had custody for the greater portion of the year to claim the dependency exemption.<sup>25</sup> However, there were three exceptions that would enable a party other than the custodial parent to claim the exemption.<sup>26</sup> The first exception applied where a decree of divorce, a

(a) Allowance of deductions

In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income.

(c) Additional exemption for dependents

(1) In general

An exemption of the exemption amount for each dependent (as defined in section 152)—

(B) who is a child of the taxpayer and who (i) has not attained the age of 19 at the close of the calendar year in which the taxable year of the taxpayer begins, or (ii) is a student who has not attained the age of 24 at the close of such calendar year.

*Id.*

25. Act of Aug. 31, 1967, Pub. L. No. 90-78, § 152(e), 81 Stat. 191, 191 (current version at I.R.C. § 152(e) (1988)). Section 152(e) provided in pertinent part:

(e) SUPPORT TEST IN CASE OF CHILD OF DIVORCED PARENTS, ETC.—

(1) GENERAL RULE.—If—

(A) a child (as defined in section 151(e)(3)) receives over half of his support during the calendar year from his parents who are divorced or legally separated under a decree of divorce or separate maintenance, or who are separated under a written separation agreement, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year unless he is treated, under the provisions of paragraph (2), as having received over half of his support for such year from the other parent (referred to in this subsection as the parent not having custody).

*Id.* Custodial parent in this context refers to the parent who has physical custody for the greater portion of the year. See Nancy J. Brown, Comment, *Domestic Relations Tax Reform*, 20 GONZ. L. REV. 251, 277 (1985).

26. § 152(e), 81 Stat. at 191-92. Section 152(e) provided in pertinent part:

(2) SPECIAL RULE.—The child of parents described in paragraph (1) shall be treated as having received over half of his support during the calendar year from the parent not having custody if—

(A)(i) the decree of divorce or of separate maintenance, or a written agreement between the parents applicable to the taxable year beginning in such calendar year, provides that the parent not having custody shall be entitled to any deduction allowable under section 151 for such child, and

(ii) such parent not having custody provides at least \$600 for the support of such child during the calendar year, or

(B)(i) the parent not having custody provides \$1,200 or more for the sup-

decree of separate maintenance, or a written agreement between the parents stated that the noncustodial parent would be entitled to claim the exemption provided the noncustodial parent contributed at least \$600 in child support<sup>27</sup> for the taxable year.<sup>28</sup> The second exception allowed the noncustodial parent to claim the exemption if he or she contributed \$1200 or more in child support for each child during the taxable year provided the custodial parent contributed less than that amount.<sup>29</sup> The third exception applied to multiple-support agreements establishing that someone other than the custodial parent would be entitled to the exemption.<sup>30</sup> The first and second of these exceptions were eliminated by the 1984 amendments to section 152(e).

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port of such child (or if there is more than one such child, \$1,200 or more for each of such children) for the calendar year, and

(ii) the parent having custody of such child does not clearly establish that he provided more for the support of such child during the calendar year than the parent not having custody.

For the purposes of this paragraph, amounts expended for the support of a child or children shall be treated as received from the parent not having custody to the extent that such parent provided amounts for such support.

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(4) EXCEPTION FOR MULTIPLE-SUPPORT AGREEMENT.—The provisions of this subsection shall not apply in any case where over half of the support of the child is treated as having been received from a taxpayer under the provisions of subsection (c).

*Id.*

27. Problems arose over the difficulty in determining the definition of support. The Treasury regulations provided a vague definition of support, which included "food, shelter, clothing, medical and dental care, education, and the like." Deborah E. Behr, Comment, *Tax Planning in Divorce: Both Spouses Benefit from the Tax Reform Act of 1984*, 21 WIL-LAMETTE L. REV. 767, 803 (1985) (quoting Treas. Reg. § 1.152-1(a)(2)(i) (1984)). In addition, courts generally defined support liberally. This led to much litigation over the valuation of the support given to the child. *Id.* at 802-03.

28. § 152(e)(2)(A), 81 Stat. at 191-92. This provision expressly permitted a state court, in a divorce or separate maintenance decree, to allocate the dependent child exemption to the noncustodial parent. *See id.* However, the current version of § 152(e) does not include language that would permit a state court to allocate the dependency exemption by means of a decree of divorce or separation. *See* I.R.C. § 152(e) (1988).

29. § 152(e)(2)(B), 81 Stat. at 192, amended by Tax Reform Act of 1976, Pub. L. No. 94-455, sec. 2139, § 152(e)(2)(B)(i), 90 Stat. 1520, 1932. This provision permitted a noncustodial parent to claim the dependent child exemption if he or she contributed the requisite amount toward the support of the child. *See id.* However, § 152(e) as amended no longer provides language that would permit the noncustodial parent to claim the dependency exemption based on the amount of his or her child support contribution. *See* I.R.C. § 152(e) (1988).

30. § 152(e)(4), 81 Stat. at 192. This exception is preserved in the current version of § 152(e). *See* I.R.C. § 152(e)(3) (1988). Multiple-support agreements are beyond the scope of this Note and, therefore, will not be discussed further.

**B. *Dependent Child Exemption Requirements After the 1984 Amendment to I.R.C. § 152(e)***

Section 152(e) was amended by Congress pursuant to the Tax Reform Act of 1984.<sup>31</sup> In the Committee Report on the Act, the Committee on Ways and Means of the House of Representatives stated that it wished to change the provisions of section 152(e) so that disputes regarding the dependent child exemption could be resolved without the involvement of the Internal Revenue Service ("I.R.S.").<sup>32</sup>

Under the amended version of section 152(e),<sup>33</sup> the dependent child exemption is specifically allocated to the custodial parent regardless of the amount of child support provided by the noncustodial parent.<sup>34</sup> There are, however, three exceptions to this general rule.<sup>35</sup> The

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31. Tax Reform Act of 1984, *supra* note 5. The provisions of the act became effective January 1, 1985.

32. The Committee Report, in the section entitled "Reasons for Change," stated:

The present rules governing the allocations of the dependency exemption are often subjective and present difficult problems of proof and substantiation. The Internal Revenue Service becomes involved in many disputes between parents who both claim the dependency exemption based on providing support over the applicable thresholds. The cost to the parties and the Government to resolve these disputes is relatively high and the Government generally has little tax revenue at stake in the outcome. The committee wishes to provide more certainty by allowing the custodial spouse the exemption unless that spouse waives his or her right to claim the exemption. Thus, dependency disputes between parents will be resolved without the involvement of the Internal Revenue Service.

H.R. REP. NO. 432, 98th Cong., 2d Sess., pt. 2, at 1498-99 (1984), *reprinted in* 1984 U.S.C.C.A.N. 697, 1140.

33. I.R.C. § 152(e) (1988).

34. I.R.C. § 152(e) provides in pertinent part:

(e) Support test in case of child of divorced parents, etc.

(1) Custodial parent gets exemption

Except as otherwise provided in this subsection, if—

(A) a child (as defined in section 151(c)(3)) receives over half of his support during the calendar year from his parents—

(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for the greater portion of the calendar year (hereinafter in this subsection referred to as the 'custodial parent').

*Id.*

35. I.R.C. § 152(e)(2)-(4) provides the following exceptions to the general rule that the custodial parent is entitled to the dependency exemption:

first exception requires that the custodial parent sign a written declaration<sup>36</sup> stating that he or she will not claim the dependency exemption.

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- (2) Exception where custodial parent releases claim to exemption for the year
- A child of parents described in paragraph (1) shall be treated as having received over half of his support during a calendar year from the noncustodial parent if—
- (A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and
- (B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

For purposes of this subsection, the term 'noncustodial parent' means the parent who is not the custodial parent.

- (3) Exception for multiple-support agreement
- This subsection shall not apply in any case where over half of the support of the child is treated as having been received from a taxpayer under the provisions of subsection (c).
- (4) Exception for certain pre-1985 instruments
- (A) In general
- A child of parents described in paragraph (1) shall be treated as having received over half his support during a calendar year from the noncustodial parent if—
- (i) a qualified pre-1985 instrument between the parents applicable to the taxable year beginning in such calendar year provides that the noncustodial parent shall be entitled to any deduction allowable under section 151 for such child, and
- (ii) the noncustodial parent provides at least \$600 for the support of such child during such calendar year.

For purposes of this subparagraph, amounts expended for the support of a child or children shall be treated as received from the noncustodial parent to the extent that such parent provided amounts for such support.

- (B) Qualified pre-1985 instrument
- For purposes of this paragraph, the term 'qualified pre-1985 instrument' means any decree of divorce or separate maintenance or written agreement—
- (i) which is executed before January 1, 1985,
- (ii) which on such date contains the provision described in subparagraph (A)(i), and
- (iii) which is not modified on or after such date in a modification which expressly provides that this paragraph shall not apply to such decree or agreement.

*Id.*

36. This written declaration will be referred to in this Note as an exemption "waiver"; it has been generally referred to as a waiver by courts that have ruled on this issue. *See, e.g.,* *Lincoln v. Lincoln*, 746 P.2d 13, 16 (Ariz. Ct. App. 1987); *Serrano v. Serrano*, 566 A.2d 413, 414 (Conn. 1989); *Hart v. Hart*, 774 S.W.2d 455, 457 (Ky. Ct. App. 1989); *McKenzie v. Jahnke*, 432 N.W.2d 556, 557 (N.D. 1988); *Hughes v. Hughes*, 518 N.E.2d 1213, 1216 (Ohio), *cert. denied*, 488 U.S. 846 (1988); *Brandriet v. Larsen*, 442 N.W.2d 455, 456 (S.D. 1989); *Sarver v. Dathe*, 439 N.W.2d 548, 551 (S.D. 1989); *Cross v. Cross*, 363 S.E.2d 449, 456 (W. Va. 1987).



This waiver allows the noncustodial parent to claim the exemption.<sup>37</sup> The second exception provides that a multiple-support agreement may entitle someone other than the custodial parent to claim the exemption.<sup>38</sup> The third exception provides that a qualified pre-1985 instrument may permit the noncustodial parent to claim the exemption. For this last exception to apply, the noncustodial parent must also provide at least \$600 in support of the child during the calendar year.<sup>39</sup>

Hence, the amount of child support provided by the noncustodial parent is no longer a factor in determining which parent may claim the exemption.<sup>40</sup> Moreover, unlike pre-1984 section 152(e), section 152(e) as amended no longer contains specific language that would permit a court to allocate the exemption to the noncustodial parent through a decree of divorce or of separate maintenance.<sup>41</sup> Section 152(e) now allocates the dependent child exemption to the custodial parent unless one of the exceptions enumerated in the section applies. Consequently, a state court's allocation of the exemption to a noncustodial parent, in the absence of one of the section 152(e)(2)-(4) exceptions, would appear to be in direct conflict with the plain language of section 152(e).

## II. *SARVER V. DATHE*<sup>42</sup>

### A. *Facts*

In *Sarver*, the plaintiff and defendant had been divorced pursuant to a Judgment and Decree of Divorce issued by the Meade County Circuit Court in 1979. Under the decree, the Meade County court awarded custody of the sole child of the marriage to the plaintiff mother and ordered the defendant father to pay child support.<sup>43</sup>

In 1986, the plaintiff sought to modify the child support agreement<sup>44</sup> and to secure an increase in the defendant's child support pay-

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37. I.R.C. § 152(e)(2) (1988). This exception is of primary concern in this Note. The remaining exceptions, § 152(e)(3)-(4), are irrelevant to the topic of this Note because the cases under review contain no agreements that might invoke those provisions. *See id.* § 152(e)(3)-(4).

38. *Id.* § 152(e)(3).

39. *Id.* § 152(e)(4).

40. *See supra* note 29.

41. *See supra* note 28.

42. 439 N.W.2d 548 (S.D. 1989).

43. *Id.* at 549.

44. Section 152(e)(4), which provides an exception to the general rule that the custodial parent is entitled to the dependent child exemption, is not applicable to the facts of the *Sarver* case. *See* I.R.C. § 152(e)(4) (1988). Section 152(e)(4) states that a noncustodial parent may claim the dependent child exemption if there exists a pre-1985 divorce decree

ments by filing a Petition for Modification of Child Support with the Department of Social Services ("DSS"). The DSS granted this petition and approved a subsequent request by the plaintiff for a further increase in the defendant's child support payments.<sup>45</sup> The defendant responded by filing a motion requesting that the Mead County court set aside the latter increase and award him the dependent child exemption. Subsequently, the court granted the defendant's requests.<sup>46</sup> The plaintiff's subsequent motion for rehearing by the Meade County court was denied, and the plaintiff appealed.<sup>47</sup>

### B. *Holding and Analysis*

The South Dakota Supreme Court held that the circuit court erred in allocating the dependent child exemption to the defendant noncustodial parent.<sup>48</sup> The South Dakota Supreme Court interpreted the provisions of section 152(e)<sup>49</sup> as specifically allocating the dependent child exemption to the custodial parent, subject to three exceptions. The court noted that for any of these exceptions to be invoked, a written document must exist. This document may be a written declaration that the custodial parent will not claim the exemption,<sup>50</sup> a multiple-support agreement that allocates the exemption to someone other than the custodial parent,<sup>51</sup> or a qualified pre-1985 instrument that allocates the exemption to the noncustodial parent.<sup>52</sup> Because no such documents existed, the court found that none of the exceptions to section 152(e) were applicable. Consequently, the court concluded that the custodial parent was entitled to the exemption and that the circuit court had erred in allocating the exemption to the noncustodial parent.<sup>53</sup>

Next, the *Sarver* court addressed the issue of whether a state

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or written agreement stating that the noncustodial parent would be entitled to the exemption. *Id.* In *Sarver*, the parties' 1979 divorce decree and child support agreement made no reference to the dependent child exemption. *See Sarver*, 439 N.W.2d at 551.

45. *Sarver*, 439 N.W.2d at 549.

46. *Id.* at 549-50. The circuit court did not order the plaintiff custodial parent to sign a written declaration that she would not claim the dependent child exemption; the court merely declared that the defendant noncustodial parent was entitled to the exemption. *Id.* at 550-51.

47. *Id.* at 550.

48. *Id.* at 551.

49. I.R.C. § 152(e) (1988).

50. *See id.* § 152(e)(2).

51. *See id.* § 152(e)(3).

52. *See id.* § 152(e)(4).

53. *Sarver v. Dathe*, 439 N.W.2d 548, 551 (S.D. 1989). The South Dakota Supreme Court apparently viewed a state court's allocation of the dependency exemption to a non-

court could order a custodial parent to execute a section 152(e)(2) exemption waiver<sup>54</sup> and thereby reallocate the dependent child exemption to the noncustodial parent.<sup>55</sup> The *Sarver* court insisted that the actions of those state courts which attempted to:

override federal tax law by ordering custodial parents to execute an exemption waiver and thus qualify noncustodial parents under 26 U.S.C. section 152(e)(2) [amounted to] . . . an unconstitutional meddling with Congressional authority granted under the Sixteenth Amendment to the United States Constitution and, [is] therefore, contrary to the Supremacy Clause of the [Constitution].<sup>56</sup>

Consequently, the South Dakota Supreme Court asserted that a state court lacks the authority to grant the dependent child exemption to a noncustodial parent without first obtaining the custodial parent's consent.<sup>57</sup>

Two justices concurred with the *Sarver* majority. Justice Morgan, in his concurring opinion, expressed his support for the view that

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custodial parent as being in direct conflict with the express language of § 152(e). See I.R.C. § 152(e) (1988); see also *supra* notes 33-41 and accompanying text.

The *Sarver* court also cited *State v. Dryden*, 409 N.W.2d 648 (S.D. 1987), as precedent for its holding. In *Dryden*, the South Dakota Supreme Court noted that the amended version of § 152(e) divested state courts of their authority to allocate the dependent child exemption. *Id.* at 652 n.2.

54. I.R.C. § 152(e)(2) (1988).

55. The facts in *Sarver* did not compel the *Sarver* court to address this issue. Although the Meade County court awarded the dependent child exemption to the noncustodial parent, the court did not implement that decision by ordering the custodial parent to execute a § 152(e)(2) exemption waiver. See *supra* note 46 and accompanying text.

However, the South Dakota Supreme Court later confronted this issue in *Brandriet v. Larsen*, 442 N.W.2d 455 (S.D. 1989), which was decided two months after *Sarver*. In *Brandriet* the court held that a state court may not order a custodial parent to execute a § 152(e)(2) exemption waiver because Congress had contemplated a "voluntary" waiver. *Id.* at 459.

It should be noted that although *Sarver* and *Brandriet* are similar in result, the analyses applied by the South Dakota Supreme Court in the two cases differ. The *Brandriet* decision focuses on the "voluntary" nature of the waiver, while the *Sarver* decision focuses on federal preemption analysis.

56. *Sarver*, 439 N.W.2d at 551-52 (citations omitted).

57. *Id.* at 552. The *Sarver* court expressed its agreement with the Michigan Court of Appeals' assertion in *Varga v. Varga*, 434 N.W.2d 152 (Mich. Ct. App. 1988), that:

[A] trial court [is] without authority to order that [a noncustodial parent] is entitled to claim the deduction without obtaining [the custodial parent's] consent. [A] court could, however, consider which parent had the benefit of the exemption under the amended tax statute and its effect on the parties [sic] ability to pay as relevant factors in deciding the amount [of child support to be provided by the noncustodial parent].

*Sarver*, 439 N.W.2d at 552 (citing *Varga*, 434 N.W.2d at 155-56). The *Sarver* court's agreement with this assertion suggests its belief that § 152(e), as amended, confers a tax benefit upon custodial parents. See *infra* notes 94-110 and accompanying text.

a state court may not allocate the exemption by ordering the custodial parent to execute a section 152(e)(2) exemption waiver.<sup>58</sup> Justice Morgan cited as support for this view the Committee Report on the Tax Reform Act of 1984, which states:

For this exception to apply, the custodial parent will have to sign a written declaration that he or she will not claim the child as a dependent for the year, and the noncustodial parent will have to attach the written declaration to his or her tax return. That declaration may be made for one or more specified calendar years. The parties may make a permanent declaration a copy of which the noncustodial parent attaches to each year's return, or the declaration may be made by the custodial spouse annually *in order to better insure the receipt of child support payments*.<sup>59</sup>

Justice Morgan emphasized the Ways and Means Committee's statement that the custodial parent had the option of annually executing the waiver "in order to better insure the receipt of child support payments."<sup>60</sup> Apparently, Justice Morgan perceived this statement as evincing the Ways and Means Committee's desire to enable a custodial parent to use the dependent child exemption as an inducement for the noncustodial parent to fulfill his or her child support obligation. He thought that permitting a state court to order the custodial parent to execute the waiver would divest the custodial parent of sole control over the waiver and thereby negate the custodial parent's ability to use the exemption as an inducement. Therefore, he concluded that Congress did not intend to vest a state court with the power to allocate the exemption.<sup>61</sup>

Justice Sabers, in his concurring opinion, agreed with the majority's assertion that the trial court could reduce the noncustodial parent's child support obligation by an amount equal to the value of the dependent child exemption.<sup>62</sup> However, he maintained that "trial courts have inherent authority to order the custodial parent to execute [a section 152(e)(2) exemption waiver] . . . because the tax exemption is part of the child support issue."<sup>63</sup> The Connecticut Supreme Court, in *Serrano v. Serrano*,<sup>64</sup> took a position similar to this view.<sup>65</sup>

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58. *Sarver*, 439 N.W.2d at 553 (Morgan, J., concurring specially).

59. *Id.* at 553 (quoting the section of the Committee Report entitled "Explanation of Provision," H.R. REP. NO. 432, *supra* note 32, at 1499, reprinted in 1984 U.S.C.C.A.N. at 1140-41).

60. *Id.*

61. *Id.*

62. *Id.* at 554 (Sabers, J., concurring specially).

63. *Id.* (citations omitted).

64. 566 A.2d 413 (Conn. 1989).

### III. *SERRANO V. SERRANO*<sup>66</sup>

#### A. *Facts*

In *Serrano*, the trial court dissolved the parties' marriage; ordered the plaintiff to pay child support to the defendant, the custodial parent;<sup>67</sup> and allocated the dependent child exemption to the plaintiff.<sup>68</sup> To implement its decision and to ensure that its allocation of the exemption to the plaintiff noncustodial parent would not conflict with section 152(e), the trial court ordered the defendant custodial parent to execute annually a section 152(e)(2) exemption waiver.<sup>69</sup>

The defendant asserted that this order was invalid, arguing that upon enactment of the 1984 amendments to section 152(e)<sup>70</sup> Congress had preempted the authority of a state court to allocate the dependent child exemption. Moreover, the defendant maintained that Congress, in enacting the amendments to section 152(e), intended to confer a tax benefit upon the custodial parent. However, Congress intended to confer this benefit to the noncustodial parent only if the custodial parent "voluntarily" consented to its transfer. It followed, the defendant argued, that the trial court's order conflicted with congressional intent and was invalid.<sup>71</sup>

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65. *See id.* at 417-18; *see also infra* text accompanying note 88.

66. 566 A.2d 413 (Conn. 1989).

67. The trial court granted the plaintiff and defendant joint custody of their child. In a joint custody arrangement such as this, the defendant, with whom the child was to reside, would be considered the custodial parent under § 152(e)(1)(B). *See* I.R.C. § 152(e)(1)(B) (1988). This section refers to the custodial parent as "the parent having custody for a greater portion of the calendar year." *Id.* In this context, custody seems to be equated with physical custody. Brown, *supra* note 25, at 280-81.

68. *Serrano*, 566 A.2d at 414.

69. *Id.* Compliance with the language of § 152(e) required that the trial court order the defendant to execute a § 152(e)(2) exemption waiver. *See* I.R.C. § 152(e) (1988). Section 152(e)(1) specifically allocates the exemption to the custodial parent. *Id.* § 152(e)(1). However, § 152(e)(2) states that if the custodial parent executes an exemption waiver, the noncustodial parent may claim the exemption. *Id.* § 152(e)(2).

70. Tax Reform Act of 1984, *supra* note 5.

71. *Serrano*, 566 A.2d at 415. The defendant also argued that the trial court's allocation of the dependent child exemption to the plaintiff was an exercise of its equitable powers that could have been avoided. She maintained that the court could have resorted to a less intrusive legal remedy, namely, reducing the plaintiff's child support payments by the value of the exemption to the plaintiff. *Id.* at 418. In response, the Connecticut Supreme Court noted that "actions for dissolution of marriage are inherently equitable proceedings," and that a court's use of its "broad equitable power" is often essential to fashioning a "just remedy." *Id.* (citations omitted). Furthermore, the court pointed out that the trial court exercised its equitable powers appropriately, considering the facts of the case. The defendant, a welfare recipient, had no income against which to apply the exemption. In addition, the state would be reimbursed for the welfare payments to the defendant out of the plaintiff's support payments. Consequently, reducing the plaintiff's support payments, instead

## B. *Holding and Analysis*

The Connecticut Supreme Court disagreed with the defendant and held that section 152(e), as amended in 1984, does not preempt a state court from allocating the dependent child exemption to the non-custodial parent.<sup>72</sup> The court began its analysis by noting that the determination of whether a federal law preempts a state law is a federal question arising under the Supremacy Clause<sup>73</sup> of the Constitution.<sup>74</sup> Consequently, the court examined United States Supreme Court precedent to determine whether section 152(e), as amended, preempts a state court's authority to allocate the dependency exemption.

The court relied primarily on *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*<sup>75</sup> for guidance regarding federal preemption analysis. Citing *Northwest Central*, the Connecticut Supreme Court stated that, ultimately, it must be determined whether Congress has exercised its power under the Supremacy Clause to preempt the state law.<sup>76</sup> Absent explicit language or statements revealing Congress' intent to preempt the state law, such intent may be inferred where:

Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of

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of granting him the exemption, would have placed a greater burden on the state. Finally, the court opined that the trial court's ruling provided "an incentive for the plaintiff to keep current in his support payments since the defendant [could] refuse to execute [the exemption waiver] for any tax year during which the plaintiff has failed to make support payments." *Id.*

72. *Id.* at 415, 418.

73. U.S. CONST. art. VI, cl. 2.

74. *Serrano*, 566 A.2d at 415.

75. 489 U.S. 493 (1989). In *Northwest Central*, the Supreme Court held that the Federal Natural Gas Act did not preempt a Kansas law that regulated the production of natural gas. *Id.* at 519-22. The Federal Natural Gas Act provided for federal regulation of the cost of natural gas. *Id.* at 506-07. However, the Kansas law also regulated the cost of natural gas by threatening the cancellation of a natural gas producer's entitlement to assigned quantities of gas if "production [were] too long delayed." *Id.* at 497. The Supreme Court held that although the Kansas law indirectly affected the cost of natural gas, it was not preempted by the federal act. *Id.* at 516. The Court found that it was possible to comply with both the federal and the state law, that the state statute did not prevent the attainment of the goals of the federal act, and that the statute achieved a proper state purpose. Consequently, the Supreme Court concluded that the statute was not preempted. *Id.* at 516-19.

76. *Serrano*, 566 A.2d at 415.

congressional objectives.<sup>77</sup>

The Connecticut Supreme Court found no explicit congressional intention to preempt a state court's authority to allocate the dependent child exemption. Neither the legislative history of the amendments to section 152(e) nor the post-1984 amendment language of the statute revealed any explicit language or statements forbidding a state court from allocating the dependency exemption.<sup>78</sup> Moreover, the court found no congressional intent to regulate the entire field of domestic relations.<sup>79</sup>

Furthermore, the Connecticut Supreme Court found that it is possible for a custodial parent to comply with both section 152(e) and a state court order that allocates the dependency exemption by ordering the custodial parent to execute a section 152(e)(2) exemption waiver. Had this been impossible, a congressional intent to preempt state courts' authority to allocate the dependent child exemption could have been inferred.<sup>80</sup>

The Connecticut Supreme Court noted that the only disputed question was whether the trial court's order stood as an obstacle to the objectives sought by Congress in amending section 152(e).<sup>81</sup> However, the court noted that because the states have traditionally regulated the field of domestic relations, "the standard for demonstrating a preempting conflict between federal law and a state domestic relations provision is high . . . ."<sup>82</sup> The United States Supreme Court articulated this standard in *United States v. Yazell*,<sup>83</sup> where it held that a federal law will preempt state family law "only where clear and substantial inter-

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77. *Id.* (citations omitted).

78. *Id.*

79. *Id.*

80. *Id.* In contrast, had the trial court simply stated in its order that the noncustodial parent may claim the exemption, compliance with both § 152(e) and the order would have been impossible because § 152(e) specifically allocates the exemption to the custodial parent. See I.R.C. § 152(e) (1988). However, this impossibility is removed when a trial court rules that the noncustodial parent may claim the exemption and orders the custodial parent to execute an exemption waiver. This is so, because § 152(e)(2) permits the noncustodial parent to claim the exemption if the custodial parent executes an exemption waiver. See *id.* § 152(e)(2).

81. *Serrano*, 566 A.2d at 415.

82. *Id.*

83. 382 U.S. 341 (1966). In *Yazell*, the federal government sought to enforce a promissory note signed by the defendants husband and wife who received a Small Business Administration disaster loan. Upon default, the government attempted to collect the deficiency from the defendant wife's separate property. The Supreme Court held that the federal government's interest in collecting on a negotiable debt did not override Texas law, which provided that "a married woman could not bind her separate property unless she had first obtained a court decree removing her disability to contract." *Id.* at 343.

ests of the National Government, which cannot be served consistently with respect for such state interests, will suffer *major damage* if the state law is applied.”<sup>84</sup>

The *Serrano* court therefore asked whether the trial court’s ruling, which ordered the custodial parent to execute a section 152(e)(2) exemption waiver, inflicted “major damage” upon the federal interests that Congress sought to achieve in amending section 152(e). To answer this question the court first attempted to determine the relevant federal interest Congress wished to achieve. The defendant argued that Congress sought to confer a tax benefit upon the custodial parent by specifically allocating the dependent child exemption to the custodial parent. The argument in support of this view is that if Congress had intended to allow a state court to transfer this tax benefit to the noncustodial parent, Congress would have provided explicit language to this effect in the 1984 amendments to section 152(e).<sup>85</sup> The defendant also noted that the pre-1984 version of section 152(e) contained language permitting a state court, through a decree of divorce or of separate maintenance, to allocate the exemption;<sup>86</sup> however, no such language exists in the amended version.<sup>87</sup>

The *Serrano* court, however, rejected the defendant’s argument, because the argument failed to recognize that state courts had been allocating the exemption “for decades,” long before the I.R.S. made explicit reference to the practice in the first version of section 152(e) in 1967.<sup>88</sup> Instead, the *Serrano* court asserted that the pertinent federal interest was Congress’ desire to remove the I.R.S. from “disputes between parents who both claim the dependency exemption.”<sup>89</sup>

After identifying the federal interest as Congress’ desire to exclude the I.R.S. from disputes pertaining to the dependent child exemption, the *Serrano* court determined that the trial court’s order did not do “major damage” to this interest. The *Serrano* court found no major damage because the trial court’s order did not conflict with

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84. *Id.* at 352 (emphasis added).

85. *See Serrano*, 566 A.2d at 416-17.

86. *See* Act of Aug. 31, 1967, Pub. L. No. 90-78, § 152(e)(2)(A)(i), 81 Stat. 191, 191-92 (current version at I.R.C. § 152(e) (1988)).

87. *Serrano*, 566 A.2d at 416-17; *see* I.R.C. § 152(e) (1988).

88. *Serrano*, 566 A.2d at 417.

89. *Id.* at 417-18 (quoting the section of the Committee Report entitled “Reasons for Change,” H.R. REP. NO. 432, *supra* note 32, at 1498, reprinted in 1984 U.S.C.C.A.N. at 1140). For a discussion concerning the appropriateness of reliance on the “Reasons for Change” portion of committee reports when determining congressional intent, see Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 878-87 (1991).



Congress' goal of removing the I.R.S. from these disputes.<sup>90</sup> Congress achieved this goal by eliminating from section 152(e) the exceptions requiring a determination of the amount of child support contributed by each parent.<sup>91</sup> The trial court's order, effectively allocating the exemption to the noncustodial parent, did not involve the I.R.S., and therefore, did not contravene Congress' purpose.<sup>92</sup>

In sum, the *Serrano* court's federal preemption analysis revealed no conflict between section 152(e) and the trial court's order. Consequently, the court concluded that section 152(e) does not preempt a state court's authority to allocate the dependent child exemption.<sup>93</sup>

#### IV. ANALYSIS

The *Sarver* court and the *Serrano* court reached different conclusions concerning whether section 152(e) preempts a state court's authority to allocate the dependent child exemption to the noncustodial parent by ordering the custodial parent to execute an exemption waiver. The *Sarver* court's reasoning implicitly suggested that section 152(e) preempts a state court's authority to order the waiver because the order does major damage to Congress' intent to confer a tax benefit upon custodial parents.<sup>94</sup> Conversely, the *Serrano* court argued against preemption because the state court order does not affect Congress' intent to remove the I.R.S. from disputes regarding the exemption.<sup>95</sup> Essentially, the *Sarver* court and the *Serrano* court disagree on what Congress intended to achieve in amending section 152(e). Consequently, a resolution of this issue will determine whether the *Sarver* court's view or the *Serrano* court's view should prevail.<sup>96</sup>

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90. *Serrano*, 566 A.2d at 418.

91. *See supra* notes 31-41 and accompanying text.

92. *Serrano*, 566 A.2d at 418.

93. *Id.*

94. *See supra* note 57 and accompanying text; *see also* *Motes v. Motes*, 786 P.2d 232, 238 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990) (citing *Sarver* as proposing that the dependent child exemption confers a financial benefit in the form of a reduction in taxable income).

95. *See supra* notes 89-93 and accompanying text.

96. If in amending § 152(e) Congress intended to confer a tax benefit upon custodial parents, a state court order that allocates the dependency exemption to the noncustodial parent does major damage to this congressional intent. Hence, pursuant to the "major damage" preemption standard promulgated by the Supreme Court in *United States v. Yazell*, 382 U.S. 341, 352 (1966), § 152(e) as amended would preempt a state court's authority to make such an allocation. *See* David J. Benson, *The Power of State Courts to Award the Federal Dependency Exemption Upon Divorce*, 16 U. DAYTON L. REV. 29, 39 (1990); James A. Rodenberg, Note, *Allocating Federal Income Tax Dependency Exemptions in Divorce Decrees*, 55 MO. L. REV. 1075, 1084 (1990); *see also supra* notes 77-84 and accompanying text. If, however, Congress' sole intent was to remove the I.R.S. from dis-

There are two arguments which support the *Sarver* court's view that the 1984 amendments to section 152(e) evince a congressional intent to confer a tax benefit upon the custodial parent. The first is that Congress specifically allocated the dependent child exemption to the custodial parent, and the noncustodial parent can receive the exemption only if the custodial parent *voluntarily* relinquishes his or her right to the exemption by executing a section 152(e)(2) exemption waiver.<sup>97</sup> The second argument is that, unlike the pre-1984 version of section 152(e), the amended version contains no language authorizing a state court to allocate the dependent child exemption.<sup>98</sup>

The *Sarver* court's reasoning follows the voluntary relinquishment argument. The court interpreted the section 152(e)(2) exemption waiver as voluntary and concluded that a state court may not allocate the dependency exemption to the noncustodial parent without obtaining the custodial parent's consent.<sup>99</sup> The South Dakota Supreme Court, in *Brandriet v. Larsen*,<sup>100</sup> reached a similar result in reliance on the Committee Report on the Tax Reform Act of 1984.<sup>101</sup> The Report stated that the custodial parent would have the option of executing the section 152(e)(2) exemption waiver yearly, to ensure that the noncustodial parent complies with his or her child support obligations.<sup>102</sup> The *Brandriet* court interpreted this statement as contemplating a voluntary waiver because state court authority to order a permanent waiver would divest the custodial parent of his or her option to execute the waiver yearly.<sup>103</sup>

Nevertheless, there is some evidence that Congress did not intend the section 152(e)(2) exemption waiver to be executed only voluntarily. Congress made no explicit statement that it intended the exemption waiver to be only voluntary, and section 152(e) does not explicitly state that the custodial parent must execute the exemption waiver voluntarily.

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putes involving the dependency exemption, § 152(e) as amended does not preempt a state court from allocating the exemption to the noncustodial parent as the allocation does not involve the I.R.S. in such disputes. See *supra* notes 90-92 and accompanying text.

97. See I.R.C. § 152(e) (1988).

98. See Act of Aug. 31, 1967, Pub. L. No. 90-78, § 152(e)(2)(A)(i), 81 Stat. 191, 191-92 (current version at I.R.C. § 152(e) (1988)); I.R.C. § 152(e) (1988).

99. *Sarver v. Dathe*, 439 N.W.2d 548, 552 (S.D. 1989).

100. 442 N.W.2d 455 (S.D. 1989).

101. H.R. REP. NO. 432, *supra* note 32, at 1499, reprinted in 1984 U.S.C.C.A.N. at 1140.

102. *Id.*; see also *supra* notes 58-61 and accompanying text.

103. *Brandriet*, 442 N.W.2d at 459.

Yet, as Judge Wright, dissenting in *Hughes v. Hughes*,<sup>104</sup> noted, the ordinary usage of the term "release" implies a voluntary relinquishment, and it is "[a] fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."<sup>105</sup> Hence, it appears reasonable to interpret the release as voluntary in nature, and consequently, the voluntary relinquishment argument is viable.

The second argument tending to support the view that Congress intended to confer a tax benefit upon the custodial parent is that while the amended version of section 152(e) specifically allocates the dependency exemption to the custodial parent, Congress deliberately omitted language that would have enabled a state court to allocate the exemption to the noncustodial parent.<sup>106</sup> This deliberate omission argument gains credibility from the fact that the pre-1984 version of section 152(e) contained language that permitted a state court to allocate the dependent child exemption.<sup>107</sup>

Some state courts, however, have rejected this argument,<sup>108</sup> asserting that the omission merely "demonstrates Congress' [ ] surpassing indifference to how the exemption is allocated as long as the IRS [does not] have to do the allocating."<sup>109</sup> These courts seem to suggest that Congress' failure to explicitly authorize state court allocation of the exemption was merely an oversight, and that Congress assumed section 152(e), as amended, would continue to be interpreted as permitting such allocation.

This response fails to consider the relevance of section 152(e)(4), which explicitly states that only "*pre-1985*" divorce decrees allocating the dependent child exemption to the noncustodial parent are recognized under the amended version of section 152(e).<sup>110</sup> The provision does not attest to Congress' "surpassing indifference"; but rather, it demonstrates a deliberate intention by Congress to omit from section 152(e) language that would recognize post-1985 divorce decrees. The

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104. 518 N.E.2d 1213 (Ohio), *cert. denied*, 488 U.S. 846 (1988).

105. *Id.* at 1216-17 (Wright, J., dissenting) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

106. See I.R.C. § 152(e) (1988).

107. See Act of Aug. 31, 1967, Pub. L. No. 90-78, § 152(e)(2)(A)(i), 81 Stat. 191, 191-92 (current version at I.R.C. § 152(e) (1988)).

108. See, e.g., *Wassif v. Wassif*, 551 A.2d 935, 940 (Md. Ct. Spec. App.), *cert. denied*, 556 A.2d 674 (Md. 1989); *Motes v. Motes*, 786 P.2d 232, 236 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990); *Cross v. Cross*, 363 S.E.2d 449, 457 (W. Va. 1987).

109. *Cross*, 363 S.E.2d at 457.

110. I.R.C. § 152(e)(4) (1988).

fact that language allowing state courts to allocate the exemption no longer exists thus demonstrates congressional intent to prohibit state courts from allocating the exemption. Hence, the *Sarver* court's view that Congress intended to confer a tax benefit upon the custodial parent by amending section 152(e) seems more persuasive than the *Serrano* court's view.

### CONCLUSION

State courts may no longer allocate the dependent child exemption. Prior to its amendment in 1984, section 152(e) contained language that permitted a state court to allocate the dependency exemption to either the custodial or the noncustodial parent. However, the amended version of section 152(e) specifically allocates the exemption to the custodial parent unless he or she executes a written declaration entitling the noncustodial parent to claim the exemption. Moreover, the amended statute makes no reference to any state court authority to allocate the dependent child exemption. Consequently, the language of the statute no longer explicitly permits a state court to allocate the dependency exemption.

Furthermore, a state court may not attempt to reallocate the dependency exemption to the noncustodial parent by ordering the custodial parent to execute a written declaration releasing his or her right to the exemption. As the *Sarver* court's reasoning suggests, the 1984 amendments to section 152(e) evince a congressional intent to confer a tax benefit upon custodial parents. Consequently, because a state court's reallocation of the dependency exemption does major damage to Congress' intent to confer a tax benefit upon custodial parents, section 152(e) must be interpreted to preempt such state court action.<sup>111</sup>

*Rodney V. Nutt*

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111. This conclusion that Congress had a deliberate intent to confer a tax benefit upon custodial parents makes it clear that such a congressional intention would be undermined by permitting state courts to allocate the exemption to the noncustodial parent. Under traditional preemption analysis whenever "clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied," preemption will be found. *United States v. Yazell*, 382 U.S. 341, 352 (1966).